Supreme Court, U.S.
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No. ___

IN THE
Supreme Court of the United States

JOSE ANGEL SERNA-GUERRA,
Petitioner,

v.

MARK FILIP, ACTING ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 2, 2009

QUESTION PRESENTED

The generic definition of the phrase "crime of violence" in 18 U.S.C. § 16 is incorporated by reference throughout federal criminal and immigration laws, as well as within the U.S. Sentencing Guidelines. In each of these contexts, a wide range of significant adverse consequences flows from the determination that a particular offense is a "crime of violence" under § 16. For example, "crime of violence" is an element of several federal crimes; prior convictions for a "crime of violence" support substantial enhancements under the Sentencing Guidelines; and, as shown in this case, a long-term permanent resident with a decades-old conviction for an offense found to be a "crime of violence" is subject to removal.

Most states have criminalized the unauthorized use of a vehicle in substantially the same terms as the specific statute at issue in this case. All those statutes prohibit such activities as joyriding, failing to return a rental car on time, using a company car on personal business, borrowing a friend's car without permission, and obtaining possession of a car under false pretenses.

The question presented is:

Does unauthorized use of a vehicle constitute a "crime of violence," as the Fifth Circuit has repeatedly held, or does that offense fall outside the § 16 definition, as the Tenth Circuit has held?

PARTIES TO THE PROCEEDINGS

Petitioner Jose Angel Serna-Guerra was the respondent before the Immigration Judge and the Board of Immigration Appeals and the petitioner in the court of appeals proceedings.

The Honorable Michael B. Mukasey, Attorney General, was the respondent in the court of appeals proceedings, and the Honorable Mark Filip, Acting Attorney General, is being substituted as respondent in this proceeding.

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Jose Angel Serna-Guerra respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This petition raises the frequently recurring issue whether the unauthorized use of a vehicle (UUV) constitutes a "crime of violence" under 18 U.S.C. § 16. That issue is now the subject of a direct and acknowledged conflict between the Fifth Circuit below and the Tenth Circuit. The Fifth Circuit's longstanding and entrenched rule simply cannot be squared with the decisions of this Court, most recently in *Chambers v. United States*, No. 06-11206, 2009 WL 63882 (U.S. Jan. 13, 2009) (to be reported at 129 S. Ct. 687); *Begay v. United States*, 128 S. Ct. 1581 (2008); and *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Taken together, those cases clearly stand for the proposition that mere unauthorized use of a vehicle lacks the requisite elements to constitute a crime of violence within the meaning of 18 U.S.C. § 16(b).

The Fifth Circuit's stubborn adherence to its rule has deepened an existing conflict among the circuits and shows no sign of abating. The court's application of its precedent has particularly pernicious consequences in this case. Petitioner has been a lawful resident since 1983, when he was 17 years old. His deportation proceedings were commenced in 2004 on the basis of a UUV conviction in *1986* when he was 20 years old (that was served fully and set aside by the state). Now 42 years old and with no other blemishes on his record, petitioner suddenly finds himself subject to removal, separation from his family, and dislocation in all aspects of his life from a decades-old conviction for UUV. Aside from the elemental justice

of this Court's reversing that harsh result, this Court can clarify the types of offenses that fall within the definition of "crime of violence" while bringing the Fifth Circuit into line with Supreme Court precedent and the approaches of the vast majority of other circuits. The petition should be either granted outright, therefore, or granted, vacated, and remanded for reconsideration in light of *Chambers*.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-10a) is reported at 285 F. App'x 110. The relevant orders of the Board of Immigration Appeals (App. 11a-15a) are not reported but are available at 2007 WL 2463989 and 2006 WL 2427888. The oral decision of the Immigration Judge (App. 16a-22a) is not reported.

JURISDICTION

The court of appeals entered its judgment on May 30, 2008, and denied a timely petition for rehearing on November 3, 2008 (App. 23a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions – 18 U.S.C. §§ 16 and 924(e), and Texas Penal Code § 31.07 – are reproduced at App. 31a-32a.

STATEMENT

A. Facts

In 1983, petitioner, then a 17-year-old Mexican national, entered the United States as a legal permanent resident. R. 12.[1] He has lived in the United States ever since. R. 10, 12. His wife, children, parents, and siblings reside in the United States, and all of his immediate family members are U.S. citizens except his wife and father. R. 12.

In 1986, petitioner pleaded guilty to a charge of unauthorized use of a vehicle (UUV) in a Texas state court. Under Texas law, "[a] person commits an offense [of UUV] if he intentionally or knowingly operates another's . . . motor-propelled vehicle without the effective consent of the owner." TEX. PENAL CODE § 31.07(a).[2] The court sentenced him to five years' imprisonment, suspended his sentence, and placed him on probation for five years. R. 228. After he satisfactorily completed one-third of his probationary period, the court discharged petitioner from further probation, set aside his conviction, and dismissed the indictment. R. 234. This 23-year-old UUV conviction is the only blemish on the record of petitioner, now 42 years old.

B. Statutory Background

Under the Immigration and Nationality Act (INA), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C.

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[1] "R." citations are to the Certified Administrative Record of Proceedings in the court of appeals.

[2] At the time of petitioner's conviction, UUV was a third-degree felony. *See* TEX. PENAL CODE § 31.07 (1986). The Texas Penal Code has since been amended, and UUV is now a state jail felony. *See* TEX. PENAL CODE § 31.07(b).

§ 1227(a)(2)(A)(iii). The list of offenses that constitute aggravated felonies includes "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(F).

Under 18 U.S.C. § 16, a crime of violence is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Many other statutory provisions, both criminal and noncriminal, incorporate § 16's definition of "crime of violence." *See Leocal v. Ashcroft*, 543 U.S. 1, 6 (2004). In *Leocal*, this Court held that a state-law driving under the influence (DUI) offense was not a "crime of violence" under § 16. The Court reasoned that a negligent DUI did not involve the offender's acting with sufficient disregard of another person's safety to meet the elements of a crime of violence. *See id.* at 8-11.

Both before and after *Leocal*, the Fifth Circuit has broadly construed § 16(b) to include a Texas UUV offense. *See United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999) (per curiam). Even after *Leocal*, which other courts and commentators have found to be inconsistent with *Galvan-Rodriguez*, the Fifth Circuit has repeatedly adhered to its view that UUV is a "crime of violence" under § 16(b). *See, e.g.*, *Brieva-Perez v. Gonzales*, 482 F.3d 356, 360-62 (5th Cir. 2007).

C. Proceedings Below

In 2004, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner. R. 256. DHS charged petitioner under 8 U.S.C. § 1227(a)(2)(A)(iii), alleging that his 1986 UUV conviction was an aggravated felony conviction because UUV is a crime of violence.[3] R. 252. The Immigration Judge found that petitioner was removable as charged based on his 1986 UUV conviction and ordered him removed to Mexico.[4] App. 21a.

On appeal, the BIA affirmed the Immigration Judge's order and, following the established rule in the Fifth Circuit, held that UUV is a crime of violence under 18 U.S.C. § 16(b). App. 15a.

Petitioner sought review of the BIA decision in the Fifth Circuit, which had jurisdiction under 8 U.S.C. § 1252(a)(1), (a)(2)(D), and (a)(5). The government, however, successfully requested a remand to permit the BIA to consider further whether UUV constitutes a crime of violence in the Fifth Circuit and to consider the impact of this Court's decision in *Leocal*. R. 55. On remand, the BIA again held that petitioner's UUV conviction was for a crime of violence under

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[3] DHS also alleged that petitioner's 1986 conviction constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) based on the argument that UUV is a theft offense for which the term of imprisonment is at least one year. R. 254. While the Immigration Judge concluded that petitioner was removable based on both charges, the Board of Immigration Appeals (BIA) and the Fifth Circuit addressed only whether UUV constitutes a crime of violence.

[4] Petitioner also sought relief under former § 212(c) of the INA, 8 U.S.C. § 1182(c) (1994) (repealed 1996), which both the Immigration Judge and the BIA denied. The Fifth Circuit did not address that issue and petitioner does not raise it here.

Fifth Circuit precedent and dismissed the appeal. App. 12a (citing *Brieva-Perez*).

Petitioner again sought review in the Fifth Circuit. The court of appeals held that the question whether UUV constitutes an aggravated felony was foreclosed by Fifth Circuit precedent, which required it to grant the government's motion for summary affirmance. App. 2a (citing *Brieva-Perez* and *Galvan-Rodriguez*). The court nevertheless "urge[d] and recommend[ed] that that precedent should be reconsidered and overruled by [the] *en banc* court." *Id.* The panel argued that this Court in *Leocal* had "rejected [the] entire rationale" for the Fifth Circuit's rule, App. 4a n.4, and noted a direct conflict with the Tenth Circuit, App. 5a-7a.

The Fifth Circuit denied petitioner's timely petition for rehearing en banc. App. 23a. Four judges dissented from the denial of rehearing. They argued that the "continued classification of UUV as a crime of violence directly conflicts with the Supreme Court's decision in *Leocal*," App. 24a, and that the decision to deny rehearing "prolongs an unnecessary disagreement with the Tenth Circuit, which correctly concluded . . . that an indistinguishable offense under Arizona law is not a crime of violence," App. 28a (citing *United States v. Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007)). The dissenters concluded by noting both their "obligation to correct panel rulings that conflict with [the Supreme Court's] instructions," App. 29a, and the "overarching interest in maintaining the uniformity of federal immigration laws and consistency in their enforcement," *id.*

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *LEOCAL*, *BEGAY*, AND *CHAMBERS*, AND IS, THEREFORE, "SIMPLY WRONGLY DECIDED"

The panel below felt bound to follow circuit precedent and summarily affirm in this case, notwithstanding its conviction that the circuit precedent was both incorrect and inconsistent with this Court's holding in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). App. 2a, 4a. The dissent from denial of rehearing en banc reiterated both points in arguing that the Fifth Circuit has significantly misinterpreted 18 U.S.C. § 16. App. 24a, 29a-30a. This Court's recent decisions in *Begay v. United States*, 128 S. Ct. 1581 (2008), and *Chambers v. United States*, No. 06-11206, 2009 WL 63882 (U.S. Jan. 13, 2009) (to be reported at 129 S. Ct. 687), validate these assertions. Ultimately, the Fifth Circuit's continued adherence to its contested analysis of § 16(b) cannot be reconciled with this Court's relevant jurisprudence, and the entire line of cases is, therefore, "simply wrongly decided." *United States v. Charles*, 275 F.3d 468, 470 (5th Cir. 2001) (Sparks, J., concurring) (arguing that "*Galvan-Rodriguez* . . . [is] simply wrongly decided"), *superseded*, 301 F.3d 309 (5th Cir. 2002) (en banc). On January 21, 2009, this Court GVR'd three cases in which the Fifth Circuit held that UUV constitutes a crime of violence for reconsideration in light of *Begay* and *Chambers*. *See United States v. Castillo-Lucio*, 256 F. App'x 720 (5th Cir. 2007) (per curiam), *vacated*, No. 07-9674 (U.S. Jan. 21, 2009); *United States v. Armendariz-Moreno*, 258 F. App'x 666 (5th Cir. 2007) (per curiam), *vacated*, No. 07-10061 (U.S. Jan. 21,

2009); *United States v. Reyes-Figueroa*, 282 F. App'x 330 (5th Cir. 2008) (per curiam), *vacated*, No. 08-6406 (U.S. Jan. 21, 2009). At a minimum, the Court should GVR this case as well, because it raises precisely the same issue as the remanded cases. Alternatively, this case presents an ideal opportunity for the Court to ensure that the Fifth Circuit's persistent error is corrected and the entrenched circuit split resolved, so that uniformity can be established in this significant area of federal law without further delay.

The Fifth Circuit's interpretation of § 16(b) is firmly entrenched and demonstrably wrong. A prior offense is a crime of violence pursuant to § 16(b) if, "by its nature, [it] involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). In determining whether a prior offense is a crime of violence under § 16(b), the court must "consider the offense generically, that is to say, . . . examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, 128 S. Ct. at 1584; *see also Leocal*, 543 U.S. at 7 (the language of § 16(b) "requires us to look at the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime").

Contrary to the Fifth Circuit's conclusion in *Galvan-Rodriguez*, the Texas offense of UUV does not "by its nature" entail a substantial risk that physical force will be used in committing the offense and therefore is not a crime of violence under § 16(b). The Fifth Circuit based its initial determination that UUV is a crime of violence on the unsubstantiated assertion that "the unauthorized use of a vehicle . . .

carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized." *Galvan-Rodriguez*, 169 F.3d at 219. As the Tenth Circuit noted, the court "cited no authority and offered little explanation for [this] blanket statement." *Sanchez-Garcia*, 501 F.3d at 1214. This Court recently rejected a similarly unsubstantiated assertion of the potential for violence in *Chambers*, slip op. at 5 (concluding that the government had provided too little "empirical information" to support its claim that failure to report was a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii)).

Moreover, even if the Fifth Circuit had relied on evidentiary support for its assertion that in some cases the offense of UUV carries a risk that the vehicle might be "broken into, 'stripped,' or vandalized," the generic offense of UUV in Texas criminalizes such a broad range of conduct that it cannot logically be said to entail, "by its nature," a substantial risk of the use of physical force in the commission of the offense. Indeed, most of the conduct criminalized by the Texas UUV statute presents no risk at all that physical force will be used. A person commits UUV under Texas law if he "intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." TEX. PENAL CODE § 31.07(a). As the dissent from denial of rehearing en banc points out:

> Texas courts have convicted defendants under the statute for such things as operating a vehicle beyond the time allotted by the vehicle's owner, *see Coleman v. Texas*, No. 11-06-00155-CR, 2008 WL 97051 (Tex. App. Jan. 10, 2008); *Wilborn v. Texas*, No. 12-06-00258-CR, 2007 WL 2381376 (Tex. App. Aug. 22, 2007); *Bradford v. Texas*, No.

> 07-02-0237-CR, 2003 WL 21501968 (Tex. App. Jul. 1, 2003); exchanging money and tickets with an employee at a car rental company to use vehicles without an authorized rental agreement, *see Roy v. Texas*, 161 S.W.3d 30 (Tex. App. 2004); taking another's keys and using the vehicle without permission, *see Johnson v. Texas*, No. 05-92-00385-CR, 1994 WL 279803 ([Tex. App.] Jun. 23, 1994); and obtaining possession of a vehicle under false pretenses, *see Nance v. Texas*, 647 S.W.2d 660 (Tex. App. 1983) (although the court reversed the conviction based on a separate evidentiary issue, it concluded that the evidence was sufficient to support the [UUV] conviction) . . . .

App. 27a n.2.

This Court's decision in *Leocal* firmly repudiated the Fifth Circuit's conclusion that an unsubstantiated risk of physical force in a small subset of UUV cases is sufficient to classify the offense as a crime of violence. As the *Leocal* Court made clear, "[t]he ordinary meaning of th[e] term ['crime of violence'], combined with § 16's emphasis on the use of physical force . . . , suggests a category of violent, active crimes," and interpreting this section too broadly "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." 543 U.S. at 11. The broad range of conduct criminalized by the Texas UUV statute cannot plausibly be placed on the "violent" side of this distinction. *See Charles*, 275 F.3d at 471 (Sparks, J., concurring) (lamenting that "most traffic violations have been elevated to crimes of violence" in the Fifth Circuit) (internal quotation marks omitted); App. 27a-28a (dissent from denial of

rehearing en banc) ("It is also difficult to see how the facially innocuous crime of UUV poses a greater risk of physical force than driving under the influence."). Nonetheless, when called upon to reevaluate its conclusion that UUV is a crime of violence under § 16(b) in light of *Leocal*, the Fifth Circuit declined, stating baldly and implausibly: "*Leocal* is fully consistent with this court's construction of the Texas UUV Statute in *Galvan-Rodriguez*." *Brieva-Perez*, 482 F.3d at 361.

In addition to its conclusion that UUV may entail a break-in or vandalism, the Fifth Circuit's determination that UUV constitutes a crime of violence was also premised on its conjecture about the wide range of violent acts that *might* occur *after* the commission of the offense. In particular, the court reasoned that

> there is a strong probability that the inexperienced or untrustworthy driver who has no pride of ownership in the vehicle will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a strong probability exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.

Galvan-Rodriguez, 169 F.3d at 219-20.

This conjecture is both unsubstantiated and irrelevant in light of *Leocal*. In *Leocal*, this Court made clear that the fact that an offense *may*, in some circumstances, lead to violence or the use of physical force is not sufficient to elevate the conduct to a crime of violence under § 16(b). Rather, "[t]he 'substantial risk' in § 16(b) relates to the use of force, not

to the possible effect of a person's conduct," *Leocal*, 543 U.S. at 10 n.7, and "the reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force . . . might be required in committing a crime," *id.* at 9-10. Thus, "*Leocal* repudiated the reasoning in *Galvan-Rodriguez* for finding UUV a crime of violence, namely [the court's] conclusion that conduct that might occur as a result of using a vehicle without authority poses a 'substantial risk' of physical force." App. 27a (dissent from denial of rehearing en banc).

This Court's recent decision in *Begay* further undermines the Fifth Circuit's reasoning in *Galvan-Rodriguez*. In *Begay*, this Court held that DUI did not constitute a violent felony under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), because "statutes that forbid driving under the influence . . . typically do not insist on purposeful, violent, and aggressive conduct." 128 S. Ct. at 1586. Notwithstanding this Court's guidance in *Leocal* and *Begay*, the Fifth Circuit (both the panel and the en banc court) rejected petitioner's claim that *Galvan-Rodriguez* was wrongly decided, unnecessarily prolonging a stark conflict with its sister circuits. Indeed, the Fifth Circuit has already considered – and rejected – the argument that the interpretation of other "crime of violence" provisions in the U.S. Code sheds light on the proper interpretation of § 16(b). In *United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc), that court held that UUV is not a crime of violence under § 4B1.2(a)(2) of the U.S. Sentencing Guidelines (U.S.S.G.) because that provision is limited to offenses that present a serious potential risk of injury to a *person*. Subse-

quently, the court declined to apply its holding in *Charles* in § 16(b) cases, noting that *Charles* "does not extend to § 16 crime of violence cases, and is therefore inapplicable." *Brieva-Perez*, 482 F.3d at 360. According to *Brieva-Perez*, *Charles* "limited *Galvan-Rodriguez* to its property aspects and to § 16 cases" because "[t]he definition of crime of violence in § 4B1.2(a) differs from the § 16 definition." *Id.* at 360 & n.3.

Thus, the Fifth Circuit has consistently declined to revisit its ten-year-old determination that UUV constitutes a crime of violence, notwithstanding several intervening cases from this Court providing both the opportunity and the necessity of doing so. This Court should grant certiorari to reaffirm its teachings in *Leocal*, *Begay*, and now *Chambers* – that § 16(b) encompasses active, reckless, and truly violent crimes, not joyriding and failure to return a rental car on time. Alternatively, the Court may wish to remand this case to give the Fifth Circuit yet another opportunity to correct its erroneous interpretation of § 16(b).

II. THE DECISION BELOW ENTRENCHES AN ACKNOWLEDGED CONFLICT ON AN ISSUE OF PRACTICAL IMPORTANCE

Even in the absence of the conflict with this Court's prior decisions, this case is independently cert-worthy because the decision below is in stark conflict with the decisions of other circuits, both in the specific analysis of the Texas UUV statute and in the more general reasoning applied to analogous state statutes under § 16(b)'s "crime of violence" provision.

A. The Fifth Circuit's Holding That UUV Constitutes A Crime Of Violence Under 18 U.S.C. § 16(b) Is In Direct And Irreconcilable Conflict With The Tenth Circuit's Conclusion To The Contrary

The conflict between the Fifth and Tenth Circuits is stark and acknowledged. The Fifth Circuit has repeatedly held that the Texas offense of UUV is a crime of violence under 18 U.S.C. § 16(b). *See supra* pp. 7-13. The Tenth Circuit, in contrast, is as firm in its conviction that UUV offenses are not crimes of violence as the Fifth Circuit is that they are. In *Sanchez-Garcia*, the Tenth Circuit criticized the Fifth Circuit's reasoning and held that the Arizona equivalent of UUV – unlawful use of a means of transport, ARIZ. REV. STAT. § 13-1803(A)(1) – is not a crime of violence under § 16(b). The *Sanchez-Garcia* court carefully considered the Fifth Circuit's decision in *Galvan-Rodriguez* and rejected it, concluding that the Fifth Circuit had "cited no authority and offered little explanation" for its holding, and that its "rationale has subsequently been rejected by the Supreme Court." 501 F.3d at 1214 (citing *Leocal*, 543 U.S. at 11).

That general conflict between the Fifth and Tenth Circuits over whether UUV offenses are crimes of violence became specific to the Texas statute just one month after the Fifth Circuit denied the petition for rehearing in this case and thereby reaffirmed its conclusion that Texas UUV is a crime of violence. In *United States v. Perez-Gutierrez*, No. 07-2129, 2008 WL 5250240 (10th Cir. Dec. 18, 2008), the Tenth Circuit held that Texas UUV is *not* a crime of violence. The Tenth Circuit not only rejected the Fifth Circuit's conclusion that the offense of UUV under the

Texas statute constitutes a crime of violence, but also held that the district court in that case had committed "plain error" in relying on the Fifth Circuit's holding to the contrary. *Id.* at *3.

This conflict is now firmly entrenched. The Fifth Circuit has considered *Leocal* and *Sanchez-Garcia* and reaffirmed its contention that UUV is a crime of violence under § 16(b), and the Tenth Circuit has rejected the Fifth Circuit's conclusion and reasoning twice. While the issue will continue to arise in each circuit with increasing frequency – UUV is a crime of frequent conviction, and § 16(b) is increasingly relevant in the removal of aliens – it is difficult to imagine a scenario in which the conflict would be resolved without this Court's intervention.

B. The Fifth Circuit's Conclusion That Texas UUV Constitutes A Crime Of Violence Conflicts With Decisions In Numerous Circuits That Reject That Classification For Other Crimes Involving More Risk Of Violence

In addition to the particularly striking conflict between the Fifth and Tenth Circuits on the precise UUV statute at issue in this case, the Fifth Circuit's rule directly conflicts with the rationales and decisions in other circuits addressing crimes that appear to be more "violent" than UUV and holding that they do not qualify as crimes of violence under 18 U.S.C. § 16(b). The *Leocal* Court explained that, "[i]n construing [§ 16(b)], we cannot forget that we ultimately are determining the meaning of the term 'crime of violence,'" and that interpreting it too broadly "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." 543 U.S. at 11. The Fifth

Circuit's conclusion that UUV constitutes a crime of violence makes a mockery of that distinction.

1. Homicide Offenses

The Second, Third, Fourth, and Eighth Circuits have held that certain homicide offenses – those that do not require that the defendant intentionally or knowingly used force to kill a person – are not crimes of violence under § 16(b). The Fourth Circuit in *Bejarano-Urrutia v. Gonzales*, 413 F.3d 444, 445, 447 (4th Cir. 2005), reasoned that a Virginia conviction for involuntary manslaughter was not a § 16(b) crime of violence because "a reckless disregard for human life is distinguishable from a reckless disregard for whether force will need to be used," and the latter recklessness is necessary to qualify as a crime of violence under § 16(b).

Similarly, the Second Circuit held in *Jobson v. Ashcroft*, 326 F.3d 367, 373 (2d Cir. 2003), that the New York crime of second-degree manslaughter is not a crime of violence under § 16(b) because it could be committed by omission and thus did not involve a substantial risk of the use of force against a person. Additionally, the court concluded that § 16(b) requires that the defendant will "*intentionally* employ physical force," and recklessness would be sufficient for second-degree manslaughter. *Id.*

The Third Circuit, in an opinion by then-Judge Alito, agreed, holding that the New Jersey offense of vehicular homicide[5] was not a crime of violence

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[5] The conflict with the Fifth Circuit cases is particularly striking in the vehicular homicide context. The Fifth Circuit concluded that a Texas UUV offense qualified as a crime of violence in large part because the *Galvan-Rodriguez* court saw a "strong probability" that an "inexperienced or untrustworthy" offender would "be involved in or will cause a traffic accident,

under § 16(b) because the crime did not require proof of the "intentional use of actual or threatened force against another's person." *Oyebanji v. Gonzales*, 418 F.3d 260, 263-64 (3d Cir. 2005); *see id.* at 264 ("[t]he quintessential violent crimes – murder, assault, battery, rape, etc. – involve the intentional use of actual or threatened force against another's person").

Finally, in *United States v. Torres-Villalobos*, 487 F.3d 607 (8th Cir. 2007), the Eighth Circuit similarly faced the issue whether manslaughter is a crime of violence and similarly applied *Leocal* to hold that it is not. Unlike the Fifth Circuit, which has reaffirmed its pre-*Leocal* holding in the UUV context notwithstanding this Court's intervening decision, the *Torres-Villalobos* court rejected the Eighth Circuit's previous holding that manslaughter is a crime of violence. *See id.* at 616 (holding that *Leocal* superseded *United States v. Moore*, 38 F.3d 977, 981 (8th Cir. 1994), and *Omar v. INS*, 298 F.3d 710, 715-17 (8th Cir. 2002)).

2. Assault and Battery

The Fourth Circuit has recognized that assault and battery crimes are not crimes of violence under § 16(b) when the defendant acts recklessly or negligently, but not intentionally or knowingly, because § 16(b) requires that there be a substantial risk that physical force will be used in the commission of the offense, and that it is not sufficient that injury is likely to result from the criminal conduct. Thus, in

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resulting . . . in personal injuries to innocent victims." 169 F.3d at 219. But when the Third Circuit decided a case in which the offender had in fact caused a traffic accident and fatally injured an innocent victim – the worst-case scenario for *Galvan-Rodriguez* – it was still insufficient to trigger the § 16(b) definition.

Garcia v. Gonzales, 455 F.3d 465, 469 (4th Cir. 2006), the Fourth Circuit held that a defendant's conviction for the New York crime of reckless assault in the second degree was not a § 16(b) crime of violence. The court, citing *Leocal*, concluded that § 16(b) "requires that the substantial risk involved be a substantial risk that force will be employed as a means to an end in the commission of the crime, not merely that reckless conduct could result in injury." *Id.*

3. Unlawful Imprisonment

The Second Circuit held in *Dickson v. Ashcroft*, 346 F.3d 44, 49 (2d Cir. 2003), that the New York crime of unlawful imprisonment of a competent adult "will always" qualify as a crime of violence under § 16. Specifically, unlawful imprisonment of an adult satisfies § 16(b) because "in any case in which a competent adult is restrained," even if by deception, "the offense will either involve the use of force to effectuate the restraint, or by its nature involve a substantial risk that force may be used." *Id.* at 51. The court contrasted the unlawful imprisonment of an adult with the unlawful imprisonment of an incompetent person or child under 16 years of age, which it held was not a § 16 crime of violence because that crime "may be accomplished by 'any means whatever, including acquiescence of the victim, if . . . the [custodial parent or institution] has not acquiesced in the movement or confinement.'" *Id.* at 51-52 (quoting statute) (alterations by *Dickson* court).

4. Arson

The Third Circuit has held that, when a defendant starts a fire recklessly, it is not a § 16(b) crime of violence, even if the fire causes personal injury or

property damage, because a crime of violence under § 16(b) "must involve a substantial risk that the actor will intentionally use physical force in committing his crime." *Tran v. Gonzales*, 414 F.3d 464, 467-71 (3d Cir. 2005). The *Tran* court concluded that the Pennsylvania crime of reckless burning or exploding was not a crime of violence because, although the statute required that the defendant "intentionally" start a fire, it did not require that the defendant intentionally use force. *Id.* at 468, 472-73.

5. Evading Arrest

The Ninth Circuit has held that the California crime of evading an officer is not a § 16 crime of violence because the *mens rea* for evading an officer is recklessness and the Ninth Circuit had previously held that § 16(a) and (b) require "more than negligent or reckless conduct." *Penuliar v. Mukasey*, 528 F.3d 603, 609 (9th Cir. 2008).

* * * * *

In numerous other analogous statutory contexts, therefore, other courts of appeals have rejected the reasoning used by the Fifth Circuit below to justify UUV as a crime of violence. Both in result and in reasoning, a square and deep conflict exists that this Court should resolve.

III. WHETHER UNAUTHORIZED USE OF A VEHICLE CONSTITUTES A CRIME OF VIOLENCE IS A FREQUENTLY RECURRING ISSUE OF SIGNIFICANT IMPORTANCE

A. The "Crime Of Violence" Definition Recurs In Numerous Statutes

The definition of "crime of violence" in 18 U.S.C. § 16 is incorporated by reference into a wide variety

of statutory provisions in both the immigration and the criminal contexts, and the enduring disagreement about its application to the common offense of UUV undermines the uniform application of federal statutes in many contexts, including immigration, sentencing, and federal criminal law.

In *Leocal*, this Court explicitly noted the broad importance of § 16 in a range of different contexts:

> [Section 16] was enacted as part of the Comprehensive Crime Control Act of 1984 . . . . Congress employed the term "crime of violence" in numerous places in the Act . . . . Congress therefore provided in § 16 a general definition of the term "crime of violence" to be used throughout the Act. . . . Section 16 has since been incorporated into a variety of statutory provisions, both criminal and noncriminal.

543 U.S. at 6-7 (citations omitted). Several examples of § 16's broad importance were cited in the text of the opinion, *id.* at 6, and in a footnote, *id.* at 7 n.4. Other examples could just as easily have been given.[6]

At the same time, most states have criminalized the unauthorized use of a motor vehicle in statutes that are either identical to or have the same funda-

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[6] *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E)(i) (deportation of an alien "convicted of a crime of domestic violence," which is defined by reference to § 16). Several provisions in the Sentencing Guidelines similarly turn on § 16. *See, e.g.*, U.S.S.G. § 2L1.2(b)(1)(C) (eight-level enhancement for prior conviction for an "aggravated felony," which includes § 16 crimes of violence); *see also, e.g.*, *Sanchez-Garcia*, 501 F.3d at 1210 (explaining application of § 2L1.2(b)(1)(C)). Decisions under § 16 are also relevant to inform the analysis in cases arising under the "violent felony" definition in the ACCA's residual clause, 18 U.S.C. § 924(e)(1). *See Chambers*, slip op. at 3 & n.2 (Alito, J., concurring) (noting that "§ 16(b) . . . closely resembles ACCA's residual clause").

mental structure as the Arizona and Texas statutes.[7] Thus, the interaction of a UUV offense and the application of § 16(b) is likely to recur frequently, in many combinations and in many jurisdictions.

The enduring split between the Fifth and Tenth Circuits causes untenable, disparate results for similarly situated offenders subject to § 16(b) depending on the state where their conviction occurs or their

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[7] *See, e.g.*, ALA. CODE § 13A-8-11(a); ARK. CODE ANN. § 5-36-108; CAL. VEH. CODE § 10851 ("Theft and unlawful driving or taking of a vehicle"); DEL. CODE ANN. tit. 11, § 853; D.C. CODE § 22-3215; HAW. REV. STAT. § 708-836 ("Unauthorized control of propelled vehicle"); KY. REV. STAT. ANN. § 514.100 ("Unauthorized use of automobile or other propelled vehicle"); LA. REV. STAT. ANN. § 14:68.4; ME. REV. STAT. ANN. tit. 17-A, § 360(A) ("Unauthorized use of property" including vehicles); MD. CODE ANN., CRIM. LAW § 7-203(a)(1) ("Unauthorized removal of property" including vehicles); MASS. GEN. LAWS ANN. ch. 90, § 24 (including "unauthorized driving"); MICH. COMP. LAWS ANN. § 750.414 ("Unauthorized taking or use, without intent to steal, of motor vehicle"); MONT. CODE ANN. § 45-6-308; NEB. REV. STAT. § 28-516 ("Unauthorized use of propelled vehicle"); N.H. REV. STAT. ANN. § 634:3 ("Unauthorized Use of Propelled Vehicle or Animal"); N.Y. PENAL LAW § 165.05 ("Unauthorized use of a vehicle in the third degree"); N.C. GEN. STAT. ANN. § 14-72.2 ("Unauthorized use of a motor-propelled conveyance"); N.D. CENT. CODE § 12.1-23-06; OHIO REV. CODE ANN. § 2913.03; OKLA. STAT. ANN. tit. 47, § 4-102 ("Unauthorized use of vehicle or implement of husbandry"); OR. REV. STAT. ANN. § 164.135; 18 PA. CONS. STAT. ANN. § 3928 ("Unauthorized use of automobiles and other vehicles"); S.D. CODIFIED LAWS § 22-30A-12 ("Unauthorized operation of vehicle or vessel as misdemeanor"); TENN. CODE ANN. § 39-14-106 ("Motor vehicles; intent; joyriding"); UTAH CODE ANN. § 41-1a-1314 ("Unauthorized control for extended time"); V.I. CODE ANN. tit. 14, § 69-1382; VA. CODE ANN. § 18.2-102 ("Unauthorized use of animal, aircraft, vehicle or boat; consent; accessories or accomplices"); WASH. REV. CODE ANN. § 9A.56.070 ("Taking motor vehicle without permission in the first degree"); W. VA. CODE ANN. § 17A-8-4 ("unlawful taking of vehicle"); WYO. STAT. ANN. § 31-11-102.

removal proceedings are initiated. Such disparate treatment significantly undermines the strong federal interest in the uniform enforcement of our immigration and criminal laws. Moreover, this lack of consistency is especially problematic in the immigration context, as a result of the discretion enjoyed by the government over the place of detention and the venue for removal proceedings for aliens subject to removal or deportation. *See infra* pp. 23-25.

B. Resolving The Circuit Split Is Of Exceptional Public Importance For Ensuring The Uniform National Application Of Immigration Laws

The importance of uniformity in the immigration context is constitutional in origin. *See* Art. I, § 8, cl. 4 (conferring on Congress the power to "establish an uniform Rule of Naturalization"). Congress has long recognized the importance of uniformity in enforcing the immigration laws. *See, e.g.*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115(1), 100 Stat. 3359, 3384 ("It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly."). And this Court has long recognized the "nation's need to speak with one voice in immigration matters." *Zavydas v. Davis*, 533 U.S. 678, 700 (2001) (internal quotation marks omitted); *see also, e.g., Graham v. Richardson*, 403 U.S. 365, 382-83 (1971) (asserting the constitutional importance of uniformity in our immigration laws). As the Seventh Circuit has observed, "[n]ational uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national

borders and who may become a citizen." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994).

The Fifth Circuit's prominent role as a vital center for immigration affairs renders its errant interpretation of § 16(b) especially problematic. The San Antonio, Texas office of U.S. Immigration and Customs Enforcement (ICE) deported a record 53,370 people from South and Central Texas in the 12 months ending in November 2008. *See* Juan Castillo, *Deportations from Central and South Texas Hit Record*, Austin-American Statesman, Nov. 7, 2008, at B1. That number was second only to the Phoenix office. *See id.* In fact, for the 2007 fiscal year, immigration courts in the Fifth Circuit accounted for more than 21% of the completed in-court proceedings in the entire country. *See* U.S. Dep't of Justice, *FY 2007 Statistical Year Book*, at B6, Table 2A (Apr. 2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. (More than 97% of immigration court proceedings are removals. *See id.* at C3, Table 3.) Only the immigration courts in the Ninth Circuit surpass the Fifth Circuit in numbers of completed proceedings.

The Fifth Circuit's central role in removal proceedings will only increase. As part of a "huge prison building and contracting campaign" to increase the number of aliens it can detain, ICE has recently added 6,700 new immigration detention beds in a chain of facilities in South Texas. *See* Spencer S. Hsu & Sylvia Moreno, *Border Policy's Success Strains Resources: Tent City in Texas Among Immigrant Holding Sites Drawing Criticism*, Wash. Post, Feb. 2, 2007, at A1.

Moreover, ICE has substantial discretion regarding where to detain and process aliens. In fact, many

of the new detention facilities in South Texas are housing immigrants from areas across the country where detention facilities are in short supply or overcrowded. *See, e.g., id.* (explaining that "large numbers of immigrants have been transferred from Boston, New York, New Jersey and Florida"); Dianne Solis & Alejandro Martinez, *Immigration Agents Arrest Nearly 300 at Pilgrim's Pride Plants*, Dallas Morning News, Apr. 17, 2008, at 1A (noting that "many of the detainees [arrested at a leather goods factory in New Bedford, Massachusetts] were taken to a South Texas detention center").

In a legal environment in which the substantive law differs from circuit to circuit, the government's unilateral control over the place of detention, and thus the forum, is particularly problematic. Arrests in one circuit followed by a transfer to another are already common. In *Garcia v. Gonzales*, for example, DHS "arrested Garcia in New York," where he had lived for many years, then "transferred [him] to Virginia due to lack of detention space in New York." 455 F.3d at 467. His case then came up through the Fourth Circuit, which treated the case as governed by its law, even though all of Garcia's contacts appear to have been with the Second Circuit. The *Garcia* transfer may have had no forum-shopping motive in fact. At the time of Garcia's arrest, however, the Second Circuit had already decided *Jobson* (*see supra* p. 16), which strongly supported the argument that Garcia's prior conviction was not for a crime of violence, while the Fourth Circuit had not yet addressed that issue. An enduring circuit split that provides the government with the unilateral opportunity to choose the substantive law that will

apply to aliens it seeks to remove from this country is especially untenable.

C. Resolving The Circuit Split Is Of Exceptional Public Importance Not Only In The Immigration Context But Also For The Uniform National Application Of Federal Criminal Laws

Over the past eight years, prosecutions and convictions for immigration violations have soared. *See, e.g.*, Dianne Solis, *Immigration Prosecutions Surge Under Bush's Watch*, Dallas Morning News, Jan. 13, 2009, at 1A. In September 2008 alone, illegal reentry (8 U.S.C. § 1326) was the lead criminal charge for both prosecutions and convictions in all of the U.S. district courts. *See* TRAC Reports, Inc., *Prosecutions for September 2008*, *available at* http://trac.syr.edu/tracreports/bulletins/overall/monthlysep08/fil/ (prosecutions for September 2008); TRAC Reports, Inc., *Convictions for September 2008*, *available at* http://trac.syr.edu/tracreports/bulletins/overall/monthlysep08/gui/ (convictions for September 2008). Given the significant enhancement authorized in the Sentencing Guidelines for an alien convicted of illegal reentry after a prior conviction of an aggravated felony (defined by reference to § 16(b)), the Fifth Circuit's erroneous interpretation of § 16(b) substantially undermines the federal interest in the fair and uniform application of federal criminal law and the Sentencing Guidelines.

Many federal laws incorporate § 16 in the criminal context, either as a factor that enhances a defendant's sentence or in the definition of a substantive offense. Outside of removal proceedings, the consequences of the Fifth Circuit's erroneous interpretation of that provision are most vividly demonstrated

in the context of sentencing pursuant to U.S.S.G. § 2L1.2. The Guidelines increase the base offense level for illegal reentry from 8 to 16. For defendants whose criminal history is low, such as Level 1, their sentences jump from 0-6 months to 21-27 months. Indeed, when the Tenth Circuit in *Perez-Gutierrez* reversed the district court's conclusion that Texas UUV constituted a crime of violence under § 16(b), the defendant's sentencing range fell from 30-37 months to 18-24 months. If his case had arisen in the Fifth Circuit, the enhanced sentencing range would have applied.

Applying substantially different prison sentences to defendants based solely on geographic fortuity due to the courts' disparate definition of a § 16(b) crime of violence is not a factor countenanced by the federal criminal system. This Court's intervention is necessary to ensure uniformity in the application of criminal laws.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE ENTRENCHED CONFLICT AMONG THE LOWER COURTS

This case provides an exceptionally good vehicle to resolve the acknowledged conflict between the Fifth Circuit and the other courts of appeals that have considered the scope of the "crime of violence" definition under § 16(b). The relevant facts are undisputed. Petitioner does not deny that he was convicted under Texas law for the unauthorized use of a vehicle. The only dispute is over the legal question whether that offense is a § 16(b) "crime of violence."

No extraneous issues or alternative holdings would distract this Court from resolving the question presented. All other issues dropped out of the case before it reached the Fifth Circuit. It is equally clear

that the entire controversy turns on that one issue. Since his UUV conviction 23 years ago, petitioner has had a spotless record. But for that one conviction, no grounds exist for his removal from the United States.

This Court has recently vacated three Fifth Circuit decisions on precisely this issue and remanded the cases for further consideration in light of *Chambers*, *see Reyes-Figueroa*, or in light of *Begay* and *Chambers*, *see Armendariz-Moreno*; *Castillo-Lucio*. At the very least, the same course would be appropriate here. Because the Fifth Circuit has already declined several opportunities to bring its jurisprudence into line with this Court's teaching, however, a GVR in this case may simply postpone the inevitable need to resolve a frequently recurring issue. To the extent that this Court was persuaded by the government's argument that *Reyes-Figueroa*, *Armendariz-Moreno*, and *Castillo-Lucio* were poor vehicles to resolve the inter-circuit conflict,[8] this case avoids those problems and offers a much better vehicle. The Court may therefore prefer to grant certiorari now and avail itself of the opportunity to resolve the issue once and for all.

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[8] *See, e.g.*, Brief for the United States in Opposition at 9-10, *Castillo-Lucio v. United States*, No. 07-9674 (U.S. filed May 9, 2008) (arguing that "[t]his Court generally does not review decisions interpreting and applying the [U.S. Sentencing] Guidelines, because the Sentencing Commission can amend the Guidelines to eliminate a conflict or to correct an error," and noting that "the Guidelines are now advisory").

CONCLUSION

The petition for a writ of certiorari should be granted; or, in the alternative, the petition should be granted, the judgment below vacated, and the case remanded for further consideration in light of *Chambers v. United States*, No. 06-11206, 2009 WL 63882 (U.S. Jan. 13, 2009).

Respectfully submitted,

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February 2, 2009

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60634

JOSE ANGEL SERNA-GUERRA,
Petitioner,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals

[Filed May 30, 2008]

Before JOLLY*, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:**

The sole issue presented in this petition for review is whether the Board of Immigration Appeals ("BIA") erred in concluding that a Texas conviction for the unauthorized use of a vehicle ("UUV"), Tex. Pen. Code

* Judge Jolly concurs only in the order granting the motion for summary affirmance and denying as moot the alternative motion for an extension of time to file a responsive pleading.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

§ 31.07, constitutes an aggravated felony.[1] Because this issue is foreclosed by Circuit precedent, *see Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007), *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999), we grant the motion for summary affirmance, thereby denying as moot the alternative motion for an extension of time to file a responsive pleading. For the following reasons, however, we urge and recommend that that precedent should be reconsidered and overruled by our *en banc* court.

"Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Section 101(a)(43) of the Immigration and Nationality Act defines "aggravated felony" to include, *inter alia*, "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(F). Title 18 of the United States Code, Section 16, in turn, defines the phrase "crime of violence" to mean, *inter alia*, "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b).

This court first addressed this issue in *Galvan-Rodriguez*, in which a panel of this court held that "the offense of unauthorized use of motor vehicle is a crime of violence within the intendment of 18 U.S.C.

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[1] Tex. Pen. Code § 31.07(a) provides that "[a] person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner."

§ 16." 169 F.3d at 219.[2] This court first noted that the phrase "substantial risk," as used in 18 U.S.C. § 16(b), does not necessarily mean that "[the risk] *must* occur in every instance; rather a substantial risk requires a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur." *Id.* (quoting *United States v. Rodriguez-Guzman*, 56 F.3d 18, 20 (5th Cir. 1995)). This court then summarily concluded that "[j]ust as burglary of a vehicle involves a substantial risk that property might be damaged or destroyed in the commission of the offense, the unauthorized use of a vehicle likewise carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well." *Id.*[3] This

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[2] In *Galvan-Rodriguez*, this court reached the definition of "crime of violence" found in Section 16(b) through a different route. At the time that case was decided, Section 2L1.2(b)(2) of the Guidelines required the district court to enhance a defendant's sentence "[i]f the defendant previously was deported, or unlawfully remained in the United States, after . . . a conviction for an aggravated felony" and application note seven defined "aggravated felony" to mean "any crime of violence" as defined in 18 U.S.C. § 16 (not including a purely political offense) "for which the term of imprisonment (regardless of any suspension of such imprisonment) is at least five years." United States Sentencing Commission, *Guidelines Manual*, § 2L1.2(b)(2) & cmt. 7 (Nov. 1996).

[3] The comparison between burglary of a vehicle and UUV is dubious. The former requires *as an element* of the offense that the perpetrator "breaks into or enters the vehicle," whereas the latter has no such element; the perpetrator simply "operates . . . [the] vehicle without effective consent of the owner." *Compare* Tex. Pen. Code § 30.04 *with* Tex. Pen. Code § 31.07.

court recognized that "the unauthorized use of a vehicle will not always result in physical force to persons or property, as, for example, when a child takes the family car 'joyriding' without parental consent." *Id.* Nonetheless, this court continued:

> [H]owever, there is a strong probability that the inexperienced or untrustworthy driver who has no pride of ownership in the vehicle will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a strong probability exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.

Id. at 219-20.[4]

In *United States v. Jackson*, 220 F.3d 635, 639 (5th Cir. 2000), another panel of this court drew on the language in *Galvan-Rodriguez* that UUV involves a substantial risk that the vehicle might be involved in an accident to hold that UUV is a crime of violence under Section 4B1.2(a) of the Guidelines. The definition of a "crime of violence" in § 4B1.2(a) differs slightly from the § 16(b) definition and provides that

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[4] The Supreme Court has subsequently rejected this entire rationale for finding a crime of violence under § 16(b). *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("Interpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes."); *id.* at 10 n.7 ("The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct."); *see also Ramirez v. Ashcroft*, 361 F. Supp. 2d 650, 655-56 (S.D. Tex. 2005) (noting that *Leocal* repudiated this rational for finding a crime of violence under § 16(b)).

"any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a). In short, § 16(b) focuses on whether there is a substantial risk that the crime will involve physical force against the person *or property*; § 4B1.2(a) focuses solely on whether there is a serious potential risk of physical injury to another person. In *United States v. Charles*, 301 F.3d 309, 314 (5th Cir. 2002) (en banc), this court clarified that simple motor vehicle theft under Texas law does not constitute a crime of violence under § 4B1.2(a) because although the perpetrator's conduct presents a risk of injury to property, *i.e.*, the automobile, it does not present a serious potential risk of physical injury to another person. Thus, this court explicitly overruled *Jackson* and limited *Galvan-Rodriguez* to its property aspects and to § 16 cases. *Id.*

This court next addressed this issue in *Brieva-Perez*, in which another panel of this court found itself bound by *Galvan-Rodriguez* and concluded that the defendant's UUV conviction constitutes a crime of violence even though his conviction was for joyriding and involved no actual use of physical force. 482 F.3d at 360-61.

Subsequent to this court's decision in *Brieva-Perez*, however, the Tenth Circuit has harshly criticized our jurisprudence in this area. *See United States v.*

Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007).[5] In that case, the Tenth Circuit addressed the issue of whether the unlawful use of means of transportation ("UUMT"), as defined under Arizona law, is a crime of violence under § 16.[6] The court first noted that "[l]ike any offense involving the unauthorized taking of property, it is clear there is *some* chance that destructive or violent force might be employed in the commission of UUMT when a person initially takes unauthorized control over a means of transportation." 501 F.3d at 1213. The court continued, however, that such risks are not "substantial" because UUMT "encompasses a broad range of conduct that does not present *any* risk of such force being used" such as driving a rental vehicle past the expiration of the rental agreement, borrowing a car that he or she

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[5] A recent law review article has likewise criticized our jurisprudence in this area. *See* Heather Harrison Volik, *Driving Down the Wrong Road: The Fifth Circuit's Definition of Unauthorized Use of a Motor Vehicle as a Crime of Violence in the Immigration Context*, 39 St. Mary's L. J. 149, 155 (2007) ("Defining UUMV as a crime of violence is at odds with *Leocal's* guiding principles and with the reasoning of the criminal and immigration statutes at issue. The end result of the Fifth Circuit's error is lifetime bans of noncitizens for conduct that has none of the characteristics of a crime of violence."). Moreover, one district court judge sitting on this court by designation concluded that *Galvan-Rodriguez* was wrongly decided and lamented that "most traffic violations have been elevated to crimes of violence in the Fifth Circuit." *United States v. Charles*, 275 F.3d 468, 470 (5th Cir. 2001) (Sparks, J., concurring), *vacated and reheard en banc by* 301 F.3d 309 (5th Cir. 2002).

[6] Ariz. Rev. Stat. § 13-1803(A)(1) provides that a person commits felony UUMT when "[a] person . . . , without intent permanently to deprive . . . [k]nowingly takes unauthorized control over another's means of transportation."

knows is stolen, or taking another's keys and going joyriding. *Id.*

Recognizing that this court reached the opposite conclusion under Texas law in *Galvan-Rodriguez*, the Tenth Circuit stated, "the *Galvan-Rodriguez* court cited no authority and offered little explanation for its blanket statement that the risk of a vehicle being broken into, 'stripped,' and vandalized is indeed substantial." *Id.* at 1214 (internal quotations omitted). The court further noted that the Supreme Court in *Leocal* rejected much of our rationale in *Galvan-Rodriguez*. *Id.* The court also analyzed the legislative history of § 16(b) to conclude that Congress intended the types of crimes covered under that section to be similar to the same categories of offenses described in the District of Columbia Code as "dangerous" and "crimes of violence." *Id.* Such crimes include murder, rape, robbery, assorted burglary crimes, assault with a dangerous weapon, and the taking of property by force. *Id.* The court concluded that "logic and common sense indicate that Congress did not intend to punish a person who was dilatory in returning a borrowed car or went joyriding in the same manner as a convicted murderer, rapist, robber, or burglar." *Id.*

The Supreme Court has emphasized that when construing § 16, "we cannot forget that we are determining the meaning of the term 'crime of violence.' . . . [and that t]he ordinary meaning of this term, . . . suggests a category of violent, active crimes." *Leocal*, 543 U.S. at 11. Here, like the Arizona statute at issue in *Sanchez-Garcia*, the Texas UUV statute criminalizes a broad range of conduct that does not present any risk of physical force being used. For example, Texas courts have convicted defendants

under this statute for such things as operating a vehicle beyond the time allotted by the vehicle's owner, *see Coleman v. Texas*, No. 11-06-00155-CR, 2008 WL 97051 (Tex. Ct. App. Jan. 10, 2008); *Wilborn v. Texas*, No. 12-06-00258-CR, 2007 WL 2381376 (Tex. Ct. App. Aug. 22, 2007); *Bradford v. Texas*, No. 07-02-0237-CR, 2003 WL 21501968 (Tex. Ct. App. Jul. 1, 2003); exchanging money and tickets with an employee at a car rental company to use vehicles without an authorized rental agreement, *see Roy v. Texas*, 161 S.W.3d 30 (Tex. Ct. App. 2004); taking another's keys and using the vehicle without permission, *see Johnson v. Texas*, No. 05-92-00385-CR, 1994 WL 279803 (Tex. Ct. App. Jun. 23, 1994); and obtaining possession of a vehicle under false pretenses, *see Nance v. Texas*, 647 S.W.2d 660 (Tex. Ct. App. 1983) (although the court reversed the conviction based on a separate evidentiary issue, it concluded that the evidence was sufficient to support the UUV conviction); none of which present any risk of physical force being used. We agree with the Tenth Circuit that it defies common sense to treat such persons in the same manner as convicted murderers, rapists, robbers, or burglars for deportation purposes.[7]

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[7] To the extent that this issue even presents a close call, the Supreme Court and this Circuit have consistently recognized "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (same); *INS v. Errico*, 385 U.S. 214, 225 (1966) ("'[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.'") (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)); *Martinez v.*

"Because the Fifth Circuit is the only circuit to find [UUV] to be a crime of violence, a troubling scenario has arisen where affected immigration laws are not being applied consistently." *Volik*, 39 St. Mary's L. J. at 176.[8] The end result is that non-citizens are being deported for life and families are being separated for committing a crime that does not have any of the hallmarks of a crime of violence. At this point, however, we recognize that Petitioner's arguments are foreclosed by Circuit precedent and it is well-settled that one panel of this court cannot overrule the decision of another panel. *See Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997). Thus,

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Mukasey, 519 F.3d 532, 544 (5th Cir. 2008) (quoting *Cardoza-Fonseca* and explaining that "[t]his canon of construction, comparable to the rule of lenity in criminal cases, is based on the drastic nature of removal"); *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 396 (5th Cir. 2006) (Smith, J., dissenting) ("Though the majority finds this weight of authority insufficient, it might at least, out of comity, acknowledge the merit of the competing position by applying the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'").

[8] In addition to the Tenth Circuit, our decision in *Galvan-Rodriguez* is also arguably at odds with the Ninth Circuit. In *Penuliar v. Mukasey*, 528 F.3d 603 (9th Cir. 2008), the court held that UUV is not a crime of violence as a theft offense under 11 U.S.C. § 1101(a)(43)(G) and in *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000), the court held that vehicular burglary is not a crime of violence under 11 U.S.C. § 1101(a)(43)(F) and § 16. *See also Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000) (holding that vehicular burglary not a crime of violence under categorical approach). If the Ninth Circuit believes that breaking or entering into a vehicle does not carry with it a substantial risk that physical force may be used against the vehicle, it most likely would conclude that the simple unauthorized use of a vehicle also does not constitute a crime of violence under 11 U.S.C. § 1101(a)(43)(F) and § 16.

although we grant the motion for summary affirmance, thereby denying as moot the alternative motion for an extension of time to file a responsive pleading, we urge and recommend that that precedent should be reconsidered and overruled by our *en banc* court.

The petition for review is DENIED.

U.S. Department of Justice

Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A38 099 578 – San Antonio, TX

Date: July 31, 2007

In re: JOSE ANGEL SERNA-GUERRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Anne D. Monahan, Esquire

ON BEHALF OF DHS:

Graciela G. Garza

Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Waiver under section 212(c); cancellation of removal

ORDER:

PER CURIAM. This case was last before us on July 24, 2006, when we dismissed an appeal from an Immigration Judge's decision dated February 4, 2005. The case is again before us on stipulated remand from the United States Court of Appeals for

the Fifth Circuit. The respondent filed a timely brief. The motion of the Department of Homeland Security to accept an untimely brief is denied. The appeal is dismissed.

The issues presented in this appeal include the question of whether a felony conviction for unauthorized use of a motor vehicle in violation of Texas law is a crime of violence, rendering the respondent deportable as an aggravated felon and ineligible for a waiver under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c).

In a recent decision, *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007), the United States Court of Appeals for the Fifth Circuit answered this question in the positive. The court held that a felony conviction for unauthorized use of a motor vehicle in violation of Texas law constituted a "crime of violence" and was thus a deportable felony under the Immigration and Nationality Act. In light of this holding, we must conclude that the respondent's felony conviction for unauthorized use of a motor vehicle in violation of Texas law constitutes an aggravated felony crime of violence. Inasmuch as there is no comparable ground of inadmissibility, the respondent is not eligible for a waiver under former section 212(c) of the Act. *See Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007).

In light of the foregoing, we see no basis on which to sustain the respondent's appeal, and the other issues before us are consequently moot. Therefore, the respondent's appeal is dismissed.

/s/ NEIL P. MILLER
FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A38 099 578 – San Antonio

Date: July 24, 2006

In re: JOSE ANGEL SERNA-GUERRA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Anne D. Monahan, Esquire

ON BEHALF OF SERVICE:

Graciela G. Garza

Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

ORDER:

PER CURIAM. The respondent has appealed from a February 4, 2005 removal order which was issued after an Immigration Judge determined he had been convicted of an aggravated felony which constituted a theft offense and a crime of violence. The Immigration Judge pretermitted the respondent's application for relief under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The DHS

(Department of Homeland Security) opposes the appeal. The appeal is dismissed.

The record included a conviction record indicating that the respondent had been convicted in a Texas state court for the state felony offense of unauthorized use of a motor vehicle, a penalty for which he was given a suspended sentence of 5 years imprisonment, with 5 years probation. *See* Exh. 7. This is an effective conviction for immigration purposes. The respondent pled guilty and was sentenced to 5 years imprisonment; this is sufficient to constitute a conviction. *See* section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A), which reads:

> The term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Further, we have consistently held that, for purposes of immigration law, convictions vacated because of post-conviction events such as rehabilitation significantly differ from those convictions which are vacated because of an underlying defect in the conviction. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). The respondent does not argue that his conviction was vacated because of an underlying defect in the conviction.

The respondent argues that he may have been convicted of an offense, but could not have been convicted of a felony offense because a deferred adjudication can only result in community supervision. This argument is not supported by the cited case, *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005). That case addresses the question of whether an offense is punishable as a felony, not the question of whether a deferred adjudication obviates the possibility of the punishment of imprisonment.

Pursuant to relevant precedents of the United States Court of Appeals for the Fifth Circuit, unauthorized use of a motor vehicle is categorically considered to be a crime of violence for immigration purposes. *See United States v. Chapa-Garza*, 243 F.3d 921, 927 (5th Cir. 2001), *citing United States v. Galvan-Rodriguez*, 169 F.3d 217, 219 (5th Cir. 1999); *see also Matter of Brieva*, 23 I&N Dec. 766, 767-770 (BIA 2005).

As the respondent is deportable under a ground (namely, a crime of violence constituting an aggravated felony) that does not have a statutory counterpart in section 212 of the Act, he is not eligible for a waiver of inadmissibility under section 212(c). *See Matter of Brieva*, supra, at 770-773; *see also Matter of Blake*, 23 I&N Dec. 722 (BIA 2005).

The appeal is dismissed.

/s/ LAURI S. FILPPU
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Antonio, Texas

File A 38 099 578 February 4, 2005

In the Matter of
JOSE ANGEL SERNA GUERRA,)
Respondent)

IN REMOVAL PROCEEDINGS

Base City: Immigration Court, 800 Dolorosa Street, Suite 300, San Antonio, Texas 78207.

Court Docket: San Antonio, non-detained.

Physical Location of Appearance: The Immigration Judge, Respondent, Respondent's attorney of record, Assistant Chief Counsel and EOIR Interpreter all present in San Antonio, Texas.

Governing Circuit Law: United States Court of Appeals for the Fifth Circuit.

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, after admission convicted of an aggravated felony as defined in section 101(a)(43)(G) of the Act, an offense relating to theft.

Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, as amended, after admission convicted of an aggravated felony as

defined in section 101(a)(43)(F), a crime of violence for which the term of imprisonment is at least one year.

APPLICATION: Respondent – section 212(c) waiver of inadmissability.

Government – Motion to Pretermit, section 212(c).

ON BEHALF OF RESPONDENT:

Guadalupe Ruiz, Esquire
110 Broadway, Suite 210
San Antonio, Texas 78205

ON BEHALF OF U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT:

Grace Garza, Esquire
Assistant Chief Counsel
P.O. Box 1939
San Antonio, Texas 78297-1939

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 38-year-old male. He was placed into removal proceedings on the proper issue and service and filing of a Notice to Appear (Form I-862), dated June 7, 2004, and served upon him by certified mail, return receipt requested. *See* Exhibit 1. The Government filed Form I-261, Additional Charges of Inadmissability/Deportability, dated September 16, 2004, served on Respondent in Court. *See* Exhibit 1A. The Government filed an additional Form I-261, dated October 19, 2004, served on

Respondent's attorney of record (*see* Exhibit 3). *See* Exhibit 1B.

Respondent, through his attorney of record, admitted that he was: not a citizen or national of the United States; a native and citizen of Mexico; and admitted into the United States at Laredo, Texas on or about April 5, 1983 as an alien lawfully admitted for permanent residence. Respondent denied that he was, on June 6, 1986, convicted in the Criminal District Court Number 3 of Dallas County Texas of unauthorized use of a vehicle and that the offense resulted in a sentence to a term of imprisonment of five years. Respondent denied both charges of removability, as amended, as stated above.

The Court found that Respondent was convicted of unauthorized use of a vehicle as alleged and sentenced to a term of imprisonment of five years. The Court found that Respondent was removable as charged by amendment.

In support of the Government's allegation and charge the record of conviction was presented. *See* Exhibit 7.

Respondent designated Mexico for purposes of removal. He requested as the sole form of relief his section 212(c) waiver of inadmissability.

The issue for the Court is whether Respondent is statutorily eligible for a section 212(c) waiver.

In support of Respondent's requested relief he has provided a fee paid application Form I-191. *See* Exhibit 11. He has provided supporting documents. *See* Group Exhibits 10 and 12 for identification.

A master calendar hearing was held on November 30, 2004. One of the issues raised was whether Respondent has a comparable ground of inadmiss-

ability to make his claim in deportation proceedings as a block 3 alien statutory eligible for a section 212(c) waiver.

The Court scheduled the matter for a hearing on the merits. *See* Exhibit 8. At that hearing, the Respondent appeared with numerous witnesses. *See* Exhibit 13.

Respondent bears the evidentiary burden of proof as to his eligibility for relief. *See* 8 C.F.R. Section 1240.8(d). *See also Diaz-Resendez v. INS*, 960 F.2d 493 495 (5th Cir. 1992); *Matter of Marin*, 16 I&N Dec. 511 (BIA 1978). Eligibility for a section 212(c) waiver is determined to be available to an individual now in removal proceedings where respondent obtained a conviction based on a plea agreement within the requisite time period as determined by *INS v. St. Cyr*, 121 S. Ct. 2271, (2001).

A section 212(c) waiver is available only to originally waived grounds of exclusion (a block 1 alien now) but it has been extended to apply in deportation (now generally referenced as removal) if the ground of deportation/removal is also a comparable ground of excludability/inadmissability. *See Matter of Chow*, 20 I&N Dec. 647 (BIA 1993).

Respondent is charged as being deportable for having been convicted of an aggravated felony for immigration purposes, an offense relating to theft and a crime of violence. Aggravated felonies do not appear in section 212(a) as a ground of inadmissability. Respondent must establish a comparable ground. *See, e.g., Matter of Mezah*, 20 I&N Dec. 603 (BIA 1991). Limited to drug trafficking, aggravated felony as a comparable ground of a controlled substance offense by *Matter of Montenegro*, 20 I&N Dec. 603 (BIA 1992). Specifically, the Board has held that although

a removable offense under section 237(a) might be determined to be a crime involving moral turpitude that is not the establishment of a comparable ground. *See Matter of Wadud*, 19 I&N Dec. 182 185 (BIA 1984); *cf. Matter of Salmon*, 16 I&N Dec. 734 736 (BIA 1978).

An Immigration Judge may exercise that authority conferred by the Attorney General. *See generally Matter of Chow*, *supra*; *Matter of Montenegro*, *supra*. Jurisdiction must be affirmatively granted by regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335 (BIA 1991). The precedent decisions of the Board of Immigration Appeals are specifically binding on the Court. *See Matter of E-L-H-*, 22 I&N Dec. 21 (BIA 1998). This Court sits within the jurisdiction of Fifth Circuit Court of Appeals and its precedent decisions are binding. *See, e.g., FDIC v. Adraham*, 137 F.3d 264 268 (5th Cir. 1998). This Court has no "equitable" authority.

Respondent has failed in his burden of establishing statutory eligibility, specifically that there is a comparable ground of inadmissability affording him the opportunity of a section 212(c) waiver.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Accordingly, the following findings of fact and conclusions of law are made.

I find the Court has jurisdiction of both subject matter and Respondent in these proceedings on the proper issue and service and filing of a Notice to Appear.

I find that no issues of law or fact remain.

I find that Respondent is not a citizen or national of the United States, but an alien.

I find that Respondent is removable as charged by amendment by evidence that is clear and convincing.

I find that the country of Mexico was designated by Respondent for purposes of removal.

I find the necessary security and fingerprint checks through the Government have been completed.

I find that the Respondent appeared statutorily eligible for a section 212(c) waiver of inadmissability.

I find that the Respondent has not established that there is a comparable ground of inadmissability making a section 212(c) waiver available to him.

I find that the Respondent and the Government have presented their respective cases and the record of proceeding as to both removability and relief is closed.

I find that inasmuch as Respondent has not established his threshold obligation that there is a comparable ground of inadmissability that the Government's motion should be granted to pretermit.

ORDERS

Accordingly, the following orders are entered

It is ordered that the Respondent's request for a section 212(c) waiver of inadmissability is pretermited and denied.

It is further ordered that any other relief for which the Respondent may have been eligible is deemed abandoned.

It is further ordered any reference to the Immigration and Naturalization Service or INS shall mean the Department of Homeland Security or DHS.

It is further ordered that Respondent shall be removed from the United States to Mexico as charged by amendment.

Dated: February 4, 2005.

JOHN D. CARTE
United States Immigration Judge

[Certificate Page Omitted]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60634

JOSE ANGEL SERNA-GUERRA,
Petitioner,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL,
Respondent.

On Petition for Review of an Order
of the Board of Immigration Appeals

[Filed November 3, 2008]

ON PETITION FOR REHEARING EN BANC
(Opinion May 30, 2008, 5th Cir., 285 F. App'x 110)

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active serve and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

JAMES L. DENNIS, Circuit Judge, joined by KING, WIENER and PRADO, Circuit Judges, dissenting from the denial of rehearing *en banc*:

Petitioner Jose Angel Serna-Guerra, a permanent resident alien, was convicted twenty-two years ago of committing the Texas crime of unauthorized use of a vehicle ("UUV"). He is now subject to removal because we have categorized that offense as a "crime of violence." *See Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007); *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999). However, our continued classification of UUV as a crime of violence directly conflicts with the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Moreover, the Tenth Circuit has concluded that our decisions are contrary to *Leocal* and held that an indistinguishable offense under Arizona law is not a crime of violence. *See United States v. Sanchez-Garcia*, 501 F.3d 1208 (10th Cir. 2007). By failing to rehear this case *en banc*, the court has chosen not to correct this error in our jurisprudence and has unnecessarily prolonged our disagreement with the Tenth Circuit. I therefore respectfully dissent from the denial of rehearing *en banc*.

The definition of "crime of violence" includes "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). A person commits UUV under Texas law "if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." Tex. Pen. Code § 31.07(a). We first classified UUV as a crime of violence in *Galvan-Rodriguez*, where despite noting that some

instances of UUV present *no* risk of physical force being used against persons or property, the panel summarily concluded that "the unauthorized use of a vehicle . . . carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well." 169 F.3d at 219. The panel elaborated:

> [T]here is a strong probability that the inexperienced or untrustworthy driver who has no pride in ownership in the vehicle will be involved in or will cause a traffic accident or expose the car to stripping or vandalism. In fact, when an illegal alien operates a vehicle without consent, a strong probability exists that the alien may try to evade the authorities by precipitating a high-speed car chase and thereby risking the lives of others, not to mention significant damage to the vehicle and other property.

Id. at 219-20. Thus, the panel concluded that UUV is a "crime of violence" because physical force might result from the commission of the offense – not because the elements of the offense naturally involve a substantial risk that physical force will be used against persons or property.[1]

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[1] *Galvan-Rodriguez* was the subject to two subsequent decisions in this circuit, both critical of its reasoning and holding. In *United States v. Jackson*, 220 F.3d 635 (5th Cir. 2000), the panel considered whether UUV is a "crime of violence" under former Guidelines § 4B1.2(a), which used a slightly different definition of the term than § 16(b) because the former did not account for force against property. The majority, concluding that *Galvan-Rodriguez* was decisive, admitted that "we are not unsympathetic to Jackson's argument that [UUV] is not what

Galvan-Rodriguez's reasoning and holding are untenable after the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). In *Leocal*, the Court held that driving under the influence of alcohol does not constitute a crime of violence under § 16. *Id.* at 11-13. The Court reasoned that § 16(a) "most naturally suggests a higher degree of intent than negligent or merely accidental conduct" and concluded that § 16(b) "does not . . . encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Id.* at 9-10. Thus, "[t]he reckless disregard in § 16 relates *not* to the general conduct or to the possibility that harm will result from a person's conduct, but to the risk that the use of physical force against another might be required in committing a crime." *Id.* The Court emphasized that "[t]he risk that an accident may occur when an individual drives while intoxicated is simply not the same thing as the risk that the individual may 'use' physical force against another in committing the DUI offense." *Id.* at 10 n.7. Because the DUI offense did not, by its nature, pose a substantial risk that the perpetrator

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one might typically consider a 'crime of violence,' but we do not write on a clean slate." *Id.* at 639. Later, in *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (en banc), the *en banc* court overruled *Jackson*, holding that UUV was not a crime of violence under § 4B1.2(a). We reasoned that although the perpetrator's conduct may present a risk of injury to property, *i.e.*, the automobile, such conduct does not present a serious risk of physical injury to another *person* as required by § 4B1.2(a). *Id.* at 314. The court declined to consider *Galvan-Rodriguez*'s in other contexts, such as § 16 cases. Nonetheless, *Charles* demonstrates our court's uneasiness with *Galvan-Rodriguez*, even pre-dating *Leocal*.

would use physical force in its commission (as opposed to the possible results of committing the crime), the court found that DUI offense at issue was not a "crime of violence." *Id.* at 10 n.7 & 11.

Leocal repudiated the reasoning in *Galvan-Rodriguez* for finding UUV a crime of violence, namely our conclusion that conduct that might occur as a result of using a vehicle without authority poses a "substantial risk" of physical force. Instead, *Leocal* requires consideration of whether the commission of the offense "naturally involve[s]" a substantial risk of harm, that is, whether the offense involves a "reckless disregard . . . to the risk that the use of physical force against another might be required in committing a crime." *Leocal*, 543 U.S. at 10. The Texas UUV offense does not, by its elements, entail a reckless disregard to the risk that physical force might be required to commit the crime. Indeed, the offense criminalizes a broad range of conduct, such as joyriding or violating a rental agreement, that does not present any risk of physical force being used against persons or property.[2] It is also difficult see how the

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[2] For example, Texas courts have convicted defendants under the statute for such things as operating a vehicle beyond the time allotted by the vehicle's owner, *see Coleman v. Texas*, No. 11-06-00155-CR, 2008 WL 97051 (Tex. App. Jan. 10, 2008); *Wilborn v. Texas*, No. 12-06-00258-CR, 2007 WL 2381376 (Tex. App. Aug. 22, 2007); *Bradford v. Texas*, No. 07-02-0237-CR, 2003 WL 21501968 (Tex. App. Jul. 1, 2003); exchanging money and tickets with an employee at a car rental company to use vehicles without an authorized rental agreement, *see Roy v. Texas*, 161 S.W.3d 30 (Tex. App. 2004); taking another's keys and using the vehicle without permission, *see Johnson v. Texas*, No. 05-92-00385-CR, 1994 WL 279803 (5th Cir. Jun. 23, 1994); and obtaining possession of a vehicle under false pretenses, *see Nance v. Texas*, 647 S.W.2d 660 (Tex. App. 1983) (although the court reversed the conviction based on a separate evidentiary

facially innocuous crime of UUV poses a greater risk of physical force than driving under the influence.

Our decision not to rehear this case also prolongs an unnecessary disagreement with the Tenth Circuit, which correctly concluded in *Sanchez-Garcia* that an indistinguishable offense under Arizona law is not a crime of violence. The defendant in *Sanchez-Garcia* had been convicted of UUMT, which a person commits under Arizona law "'if, without intent permanently to deprive, the person . . . [k]nowingly takes unauthorized control over another person's means of transportation." *Sanchez-Garcia*, 501 F.3d at 1209 (quoting Ariz. Rev. Stat. § 13-1803(A)(1) (alterations in original)).[3] The Tenth Circuit observed that "[l]ike any offense involving the unauthorized taking of property, it is clear there is *some* chance that destructive or violent force might be employed in the commission of UUMT when a person initially takes unauthorized control over a means of transportation." 501 F.3d at 1213. But the Tenth Circuit concluded that such risks are not "substantial" because

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issue, it concluded that the evidence was sufficient to support the UUMV conviction); none of which present any risk of physical force being used.

[3] The essential elements of the Texas UUMV offense and the Arizona UUMT offense are virtually identical. *Compare* Ariz. Rev. Stat. § 13-1803(A)(1) (prohibiting (1) knowingly taking control, (2) without authorization, (3) of another person's means of transportation), *with* Tex. Pen. Code § 31.07 (prohibiting (1) the intentional or knowing operation, (2) without the effective consent of the owner, (3), of another's motor-propelled vehicle). Although the Arizona statute has an additional phrase ("without intent to permanently deprive") that does not appear in the Texas statute, the phrase is not an affirmative element of the offense. *See State v. Kamai*, 911 P.2d 626, 628 (Ariz. App. 1995).

UUMT "encompasses a broad range of conduct that does not present *any* risk of such force being used" such as driving a rental vehicle past the expiration of the rental agreement, borrowing a car that he or she knows is stolen, or taking another's keys and going joyriding. *Id.* The Tenth Circuit considered but rejected our decision in *Galvan-Rodriguez*, finding that it relied on unsupported conjecture and conflicts with *Leocal*. *Id.* at 1214.[1]

We are bound by the Supreme Court's decisions and therefore have an obligation to correct panel rulings that conflict with its instructions. *See Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994); *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). There is also an overarching interest in maintaining the uniformity of federal immigration laws and consistency in their enforcement. *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006); *Renteria-Gonzalez v. INS*, 322 F.3d 804, 814 (5th Cir. 2002). Rehearing this case would serve those purposes, yet the majority of the court

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[1] In *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007), the panel attempted to reconcile *Galvan-Rodriguez* with *Leocal*. The panel concluded that an offense can be a crime of violence under *Leocal* even in the absence of an element requiring intentional use of force because "*Leocal* requires [only] that the nature of the offense involves a substantial risk of the intentional use of force." 482 F.3d at 360-61. Apparently relying on *Galvan-Rodriguez*'s finding that UUV naturally involves such a substantial risk, the panel held that *Leocal* is therefore consistent with *Galvan-Rodriguez*. *Id.* at 361. However, as discussed above and as the Tenth Circuit recognized, the reasoning in *Galvan-Rodriguez* – which relied on the possible incidental effects of committing the crime – conflicts with *Leocal*'s holding that a crime is "violent" only if the risk is inherent in the commission of the crime itself. The petitioner in *Brieva* did not petition the Supreme Court for a writ of certiorari.

has chosen to allow our erroneous classification of UUV as a crime of violence to continue. Accordingly, I dissent from the denial of rehearing *en banc*.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 16 provides:

§ 16. Crime of violence defined

The term "crime of violence" means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(e) provides in relevant part:

§ 924. Penalties

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

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Texas Penal Code § 31.07 provides:

§ 31.07. Unauthorized Use of a Vehicle

(a) A person commits an offense if he intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner.

(b) An offense under this section is a state jail felony.